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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75 - 837

Filed December 15, 1975

C. M. Elmore

Petitioner,

vs

THE NORTH BECKLEY PUBLIC SERVICE DISTRICT

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The petitioner, C. M. Elmore, General Delivery Cranberry, West Virginia, Zip Code 25828, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on the 6th day of October, 1975.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether or not Chapter 16, Article 13A, Section 13 of the Code of West Virginia of 1931 as amended, is unconstitutional as repugnant to Section 2 of the Fourteenth Amendment to the Constitution of the United States; Article X,§§1 through 8 of the Constitution of West Virginia.

2. Whether the Respondents denied to the Petitioners equal protection of the law in failure to give proper notice of the creation of the North Beckley Public Service District.

3. Whether or not the Respondent denied to the petitioners' procedural due process in the manner in which they issued an "order" of November 13, 1962 by attempting to correct the non-exixtence of an order or a memorandum in lieu of an order by a **nunc pro tunc** order.

4. Submitting that all of the questions from one to three must be answered in the affirmative, whether or not the Respondents have ever had legal existence and if in the negative, all their actions are void **ab initio;** which we submit is true.

Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment
United States Constitution, Sixth Amendment
United States Constitution, Fourteenth Amendment
West Virginia Constitution, Article X, Section 1 thru 8
West Virginia Constitution, Article 3, Section 9
West Virginia Code, Chapter 16, Article 13A, Section 13
West Virginia Code, Chapter 13, Article 1, Section 4
Code of West Virginia of 1931 as amended, Chapter 54

STATEMENT OF THE CASE

On November 27, 1962 the County Court of Raleigh County met in regular session as shown by the order Book 32 at page 128. The records reveal that during this session, the county court proposed a resolution and order to create the North Beckley Public Service District. In the resolution itself, it is shown as dated on the 13th of November, 1962. A note is appended thereunto stating "(Order should have been entered November 13, 1962, is entered now for then)". This order of November 27, 1962, is in the nature of a **nunc pro tunc** order.

On November 30, 1962 the County Court caused to be published in the Beckley Post Herald a meets and bounds description of the territory proposed to be included within the North Beckley Public Service District. This meets and bounds description had been drawn by an engineer and was not in accordance with the property lines shown by the various property owners in accordance with the deeds recorded in the county courthouse; for example, a deed would say Lot, etc., in Sub-division etc., Section etc., whereas, the meets and bounds description constituted a line of demarkation dividing other property from the property proposed to be included in the North Beckley Public Service District so that the description given by the North Beckley Public Service District engineer or the engineer working for them was not a description that had been theretofore recorded and used in the county courthouse in connection with determining the lines of demarkation of property. This description resulted in a large percentage of the owners of property within and without this area being unable to determine whether their property was included within the district or not, in an infinitesimally small number of people being present at the hearing to vote either for or against. Actually, the only

people that were in favor of the district were prople who were close friends of the persons creating it.

The result of course was that there was little or no opposition to the formation of the district. A board of directors was elected and revenue bond issue was voted for some $900,000.00 to start the matter off. Actually fifty per cent of the eligible people of the district refused to hook onto the line when it was completed.

The reason why the people refused to hook on were twofold.

1. They felt the district had been created without their approval or right to vote pro or con.

2. The right of way necessary to lay the line was arbitrarily taken from the property owners without condemnation proceedings and in many cases by force.

Of the 300 persons protesting the creation of this district, approximately twenty to thirty percent complained that the digging equipment and construction crews would enter their property, dig the ditches for the lines, lay the lines and destroy considerable of the property, shrubs, buildings and fences, all against the will of the property owners.

The above described circumstances resulted in immediate litigation. The district would sue scores of property owners asking for mandatory injunctions requiring them to hook onto the sewer facilities and for the court to levy liens against their property for arrears sewage fees where failure to hook on had been continued over a period of months. The property owners tried to employ counsel from Raleigh County and were unable to get any lawyers who would represent them against their local combine. They finally went as far away as Welch, West Virginia to employ counsel and to Charleston, West Virginia. At one time there were two hundred cases consolidated for hearings in the Circuit Court of Raleigh

County. One of the lawyers applied to the court for a mandatory injunction to require the respondents to dig up their lines on the grounds that they were trespassers since they had not filed condemnation proceedings prior to entry upon petitioners' land. The judge refused the injunction, but in lieu thereof, in all such cases required condemnation proceedings to be filed even though entry upon the land had already been made. This action by the court left two classes of people:

1. People whose land had been entered and who were to receive the reasonable value thereof through condemnation.

2. People whose land was not touched but who were required to hook on and pay arrears fees in amounts as much as $300.00 that had accrued during a period of three or four years.

In class one the liens that had been attached against the people's land where the trespass had occurred were ordered removed by the court.

On at least two occasions appeals were taken to the Supreme Court of Appeals of West Virginia in which constitutional violations were invoked and each time the Supreme Court of Appeals refused to grant Writs of Error.

For the past two years the regular Circuit Judge has refused to sit on matters in which the respondents were involved and a special judge from an adjoining county has been designated. The result has been that in the cases in which the special judge has ordered condemnation proceedings to be brought, only one or two cases have been tried and none of the property owners have actually received any money from the property taken from them. The liens have not been removed from their property and still remain against both classes of property set out above. These liens increase each year since the respondents add the

monthly charge for sewer regardless of whether its used or not, together with interest. The petitioners have repeatedly tried to obtain some relief from the courts of this state without avail. They are no longer able to employee council to represent them and as a last resort are now attempting to represent themselves.

As a last resort therefore, they instituted the proceeding in mandamus against the respondents on the theory that the North Beckley Public Service District has never had status de jure, but only de facto and hence the court should mandamus, order the district and officials thereof to cease and desist from bothering the petitioners any further with respect to connecting with the sewerage facilities, require them to take action to remove all liens from all the petitioners' property and place them in a condition of status quo immediately prior to November 30, 1962. It is from the order denying this petition of the 6th of October, 1975 that these petitioners pray this writ.

REASONS FOR GRANTING THE WRIT

1. The Petitioners claim that the West Virginia Constitution singles out no discrete and insular minority as set forth in chapter 16 of the Code of West Virginia of 1931 as amended and that the three-fifths requirement established by the Constitution of West Virginia applies equally to all bond issues for any purposes, whether for schools, sewers or highways. In the case at bar, approximately thirteen people appeared for this hearing when approximately six hundred were eligible. The reasons were two fold:

1. They did not have notice.

2. The order was not a legal order creating the district. So that not sixty per cent, not ten per cent, not even five per cent of the eligible people in the district had anything to say

as to whether or not this district was to be created or not. In the case of *A. F. Gordon*, et al vs. *Granville H. Lance*, et al, 372 U.S. 368, this court granted a Writ of Certiorari in a similar case. In that case this court said:

> "West Virginia has adopted a rule of decision, applicable to all referenda, by which the strong concenus of three-fifths is required before indebtedness is authorized, does not violate the equal protection clause or any other provision of the constitution."

In *Gordon, supra*, the court said further:

"On April 29, 1968, the Board of Education of Roane County, West Virginia, submitted to the voters of Roane County a proposal calling for the issuance of general obligation bonds in the amount of $1,830,000.00 for the purpose of constructing new school buildings and improving existing educational facilities. At the same election, by separate ballot, the voters were asked to authorize the Board of Education to levy additional taxes to support current expenditures and capital improvements. Of the total votes cast, 51.55% favored the bond issues and 51.51% favored the tax levy. Having failed to obtain the requisite 60% affirmative vote, the proposals were declared defeated.

Following the election, respondents appeared before the Board of Education on behalf of themselves and other persons who had voted in favor of the proposals and demanded that the Board authorize the bonds and the additional taxes. The Board refused.

Respondents then brought this action, seeking a declaratory judgment that the 60% requirements were unconstitutional as violative of the Fourteenth Amendment. In their complaint they alledged that the Roane County Schools had been basically unimproved

since 1946 and fell far below the State average, both in classroom size and facilities. They further allege that six similar proposals had been previously defeated, although each had received majorities of affirmative votes ranging from 51.51% to 55.84%. The West Virginia trial court dismissed the complaint. On appeal, the West Virginia Supreme Court of appeals "reversed, holding that the State constitutional and statutory 60% requirement violated the Equal Protection Clause of the Fourteenth Amendment. 170 S.E. 2nd 783 (W. Va. 1969). We granted certiorari. 397 U.S. 1020 (1970) and for the reasons set forth below we reverse.

The court below relied heavily on two of our holdings dealing with limitations on the right to vote and dilution of voting power. The first was *Gray* v. *Sanders*, 372 U.S. 368 (1963), which held that Georgia's county-unit system violated the Equal Protection Clause, because the votes of primary electors in one county were accorded less weight than the votes of electors in other counties. The second was *Cipriano* v. *Houma*, 395 U.S. 701 (1969), in which we held impermissible the limitation to "property taxpayers" of the right to vote in a revenue bond referendum. From these cases the state court concluded that West Virginia's requirement was constitutionally defective, because the vote of those who favored the issuance of the bonds had a proportionately smaller impact on the outcome of the election than the votes of those who opposed issuance of the bonds.

We conclude that the West Virginia court reliance on the *Gray* and *Cipriano* cases was misplaced. The defect this court found in those cases lay in the denial or dilution of voting power because of group characteristics - geographic location and property ownership - that bore no valid relation to the interest of those groups in the subject matter of the election; moreover, the dilution or denial was

imposed irrespective of how members of those groups actually voted."

"Thus in *Gray, supra,* at 381 n, 12, we held that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit 40% cast for the other candidates being discarded. The defect, however, continued to be geographic discrimination. Votes for the losing candidates were discarded solely because of the county where the votes were cast. Indeed, votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the state-wide total.

Cipriano was no more than a reassertion of the principle, consistently recognized, than an individual may not be denied access to the ballot because of some extraneous condition such as race, e.g., *Gamillion* v. *Lightfoot,* 364 U.S. 339 (1960); wealth, e.g., *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, (1966); tax status, e.g., *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); or military status, e.g., *Carrington* v. *Rash,* 380 U.S. 89 (1965).

Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. The three-fifths requirement applies equally to all bond issues for any purpose, whether for schools, sewers, or highways. We are not, therefore, presented with a case like *Hunter* v. *Erickson,* 393 U.S. (1969), in which fair housing legislation alone was subject to an automatic referendum requirement."

"The class singled out in *Hunter* was clear - "those who would benefit from laws barring racial, religious, or

ancestral discriminations", supra, at 391. In contrast we can discern no independently identifiable group or category that favors indebtedness over other forms of financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote Cf. *Carrington* v. *Rash, supra,* at 94.

Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult for some kinds of govermental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history or our cases that require that a mojority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electrorate, we have found no constitutional barrier to the selection of a governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris,* 385 U.S. 231 (1966).

The Federal Constitution itself provides that a simple majority vote is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy. The constitution of many states prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bonded indebtedness, "thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less, "important", than matters of treaties, foreign policy or impeachment of public offices is more properly left to the determination by the States and the people than to the courts operating under the board mandate of the Fourteenth Amendment. It must be remembered that in voting to issue bonds voters are committing in part the

credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand. That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness limitation; it does not alter the basic fact that the balancing of interests is one for the State to resolve.

Wisely or not, the people of the State of West Virginia have long since resolved to remove from a simple majority vote the choice on certain decision as to what indebtedness may be incurred and what taxes their children will bear.

We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause. We see no meaningful distinction between such absolute provisions on debt, changeable only by constitutional amendment, and provisions that legislative decisions on the same issues require more than a majority vote in the legislature. On the contrary, these latter provisions may, in practice, be less burdensome than the amendment process. "Chapter 13, Article 1, Section 4 of the Code of West Virginia of 1931, as amended which is bottomed upon Article X§§1 and 8 of the West Virginia Constitution says with respect to the issuance of revenue bonds, "no debt shall be contracted or bonds issued under this Article until all questions connected with the same shall have been first submitted to a vote of the qualified electors of the political division in which the bonds are to be issued, and shall have received *three-fifths* of all the votes cast for and against the same." It is this provision of the statute that *Gordon* v. *Lance, supra,* declares to be constitutional and governing as against a majority vote. In *Gordon, supra,* the court held that a majority vote was not sufficient in a district; that three-fifths of the voters must be in favor of the bond issue. In the case at bar there were

no votes except the possible 13 or 14 people voting for the creation of the district. It simply means that in the instant case we do not have three-fifths; we do not have a majority; we do not have a minority; in fact, we do not have a vote of the people in the district which obligated them to pay for millions of dollars worth of revenue bonds.

The question is how did the board take this action to issue the revenue bonds. The answer is that they did it under the provisions of the Code, 16-13A-13. This is diametrically opposed to Chapter 13, Article 1, Section 4 of the Code of West Virginia which provides, as shown above, that a bond issue may be approved only by a three-fifths majority of all the votes cast for and against the same, and to Article X§§1 and 8 of the Constitution of West Virginia upon which said Code is based.

It is also clearly repugnant to the Gordon case, supra, and to the line of cases cited therein. In respect to the application of the West Virginia Constitutional Requirement and the requirement of Code 13-1-4 that a three-fifths majority vote is required, it is respectfully requested that the court bear in mind that respondents are agencies of the state, the same as all other agencies.

CONCLUSION

It is realized that this Petition is not artfully drawn and that this litigation has not been procedurally well handled because by and large it has had to be handled by laymen due to lack of funds. There is a way now that errors that were committed two years ago and not properly brought to this court's attention procedurally, can now be corrected; except that this court can grant the Writ of Certiorari and order the entire litigation files for review.

As representative of this group of taxpayers who consist by and large of poor retired miners in the low income group in Raleigh County, I am convinced that if this court would properly delve into the matter it would conclude that the constitutional rights of these poor property owners were indeed violated; and issue such instructions to the lower courts as might be calculated to strike out what is in reality a grave injustice, although I am sure to the legal mind, it si now obscured by a procedural nightmare.

RESPECTFULLY SUBMITTED:

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